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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

MICHAEL R. WENGER, Commissioner, West Virginia Department of Employment Security, J. F. McCLANAHAN, CLARENCE ELMORE, and JOHN T. POFFENBARGER, Members of the Board of Review,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The partially owned subsidiaries of Westinghouse Electric Corporation are as follows: Ateliers de Constructions Electriques de Charleroi, S.A. (ACEC); Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW); Electrocontroles Villares, Ltda.; Eletromar Industria Eletrica Brasileira, S.A.; Electromar Industria Eletrica Brasileira, S.A., Eletromar Nordeste, S.A.; Galileo Argentina C.I.F.S.A.; Hundt & Weber Schaltgerate GmbH; Ideal School Supply Company, Living & Learning (Cambridge), Ltd.; Mecanica Pesada, S.A.; Mex Control S.A. de C.V.; Motores Electricos de Juarez S.A. de C.V.; Offshore Power Systems (a partnership); Schneider S.A.; Silectra S.A. de C.V.; Societa Progettiazione Reattori Nucleari, S.p.A. (SOPREN); Tyree Industries Limited; W. T. Engineering Pty. Limited, Westralian Transformers Pty. Limited; Westrans (W.A.) Pty. Limited, Westralian Transformers Pty. Limited; Tyree-Power Construction Limited; Westinghouse Broadcasting Company, Inc., CATV Enterprises, Inc.; Westinghouse Broadcasting Company, Inc., Sutro Tower, Inc.; Westinghouse Broadcasting Company, Inc., Television Tower, Inc.; Westinghouse Canada Inc., Westinghouse de Venezuela, S.A. (VENWESA), Transformadores de Distribucion, S.A. (TRADESA); Westinghouse de Venezuela, S.A., Westinghouse Electro Metalurgicas C.A. (WEMCA); Westinghouse de Brasil S.A., CMW Sistemas, Ltda.; Westinghouse Electric S.A. (WELSA), Eurofuel; Westinghouse Electric S.A. (WELSA), Industry Services Company of Saudi Arabia, Ltd. (ISCOSA); Westinghouse Electric S.A. (WELSA), Galileo Argentina, C.I.F.S.A.; Westinghouse Electric S.A. (WELSA), Westinghouse, S.A. (WESA); Westinghouse Electric S.A. (WELSA), Westinghouse, S.A. (WESA), Westinghouse Proyectos Electricos, S.A. (WEPESA); Westinghouse Electric S.A. (WELSA), Westinghouse Asia Controls Corp.; Westinghouse Electric S.A. (WELSA), Westinghouse Supply Company of Saudi Arabia (WESCOSA); Westinghouse Electric S.A. (WELSA), IEM, S.A.; Westinghouse Electric S.A. (WELSA), IEM, S.A., Mex Control, S.A. de C.V.; Westinghouse Electric S.A. (WELSA), IEM, S.A., Silectra, S.A. de C.V.; Westinghouse Electric S.A. (WELSA), Wexico Systems and Services, Ltd.; Westinghouse International Power Systems Company, Inc., Offshore Power Systems (a partnership); Westinghouse (Jamaica) Ltd.; Westinghouse Proyectos Electricos, S.A. (WEPESA); Westinghouse World Investment Corporation, Ateliers de Constructions Electriques de Charleroi S.A. (ACEC); Westinghouse World Investment Corporation, Galileo Argentina, C.I.F.S.A.; Westinghouse World Investment Corporation, IEM, S.A.

The Petitioner, Westinghouse Electric Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 15, 1980.

QUESTION PRESENTED

May a state regulate the collective bargaining practices of an employer subject to the National Labor Relations Act by awarding statutory unemployment compensation benefits to striking employees based upon a determination by a state agency as to whether the employer had engaged in improper practices in its collective bargaining with those employees?

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The opinion of the Court of Appeals, dated September 15, 1980, not reported, appears in Appendix D hereto (1d-2d). The bench opinion of the United States District Court for the Southern District of West Virginia, delivered September 28, 1979, reproduced from transcript of same date, appears in Appendix A hereto (1a-7a). The order of the District Court denying Westinghouse Electric Corporation's motion for reconsideration, dated November 1, 1979, not reported, appears in Appendix B hereto (1b-2b). The memorandum order and opinion of the District Court, dated November 26, 1979, not reported, appears in Appendix C hereto (1c-7c).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 15, 1980. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding.

STATUTES INVOLVED

Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W.Va. Code §21A-6-3(4) (1978), provides for the payment of unemployment compensation benefits to striking employees after a state unemployment compensation Appeals Tribunal, the West Virginia Unemployment Compensation Board of Review, or a reviewing state court determines that an employer has denied employees the right of collective bargaining under generally prevailing conditions:

§21A-6-3. Disqualification For Benefits.

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits:

> (4) For a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory,

establishment or other premises at which he was last employed, unless the commissioner is satisfied that he was not (one) participating, financing, or directly interested in such dispute, and (two) did not belong to a grade or class of workers who were participating, financing, or directly interested in the labor dispute which resulted in the stoppage of work. *No disqualification under this subdivision shall be imposed* if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or *if employees are denied the right of collective bargaining under generally prevailing conditions,* or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions. *Id.* [Emphasis supplied.]

The relevant provisions of The National Labor Relations Act, 29 U.S.C. §151, *et seq.* (1976) are set forth in Appendix E hereto (1e-3e).

STATEMENT OF THE CASE

In May 1979, Petitioner, Westinghouse Electric Corporation ("Westinghouse"), and the International Union of Electrical, Radio and Machine Workers (the "IUE"), the labor union representing production and maintenance workers at Westinghouse's Fairmont, West Virginia plant, entered into national collective bargaining negotiations. The 1979 Westinghouse-IUE national collective bargaining negotiations were conducted in Pittsburgh, Pennsylvania. These negotiations concerned 32 Westinghouse plants, located in 13 states, employing approximately 22,000 IUE-represented employees. When, on July 16, 1979, Westinghouse and the IUE were unable to reach agreement on a new contract, IUE-represented employees, including the production and maintenance employees at the Fairmont plant, began a strike at all Westinghouse plants. The strike continued until September 1, 1979, when Westinghouse and the IUE reached agreement.

Subsequently, over 1,700 production and maintenance employees at the Fairmont plant filed claims for unemployment compensation under Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W.Va. Code §21A-6-3(4) (1978) ("Section 21A-6-3(4)"), alleging that Westinghouse had denied them "the right of collective bargaining under generally prevailing conditions" at the 1979 Westinghouse-IUE national negotiations. The total amount of these claims was approximately $1,500,000 and a hearing thereon was scheduled before a West Virginia Unemployment Compensation Appeals Tribunal on October 2, 1979. Under Section 21A-6-3(4), unemployment compensation is paid to striking employees if the state

authorities determine that the employer has committed an unfair practice in its collective bargaining with the employees.[1] Any unemployment compensation awarded to employees is charged against the employer's account with the state and, therefore, is ultimately paid by the employer.[2]

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1. Under the West Virginia Unemployment Compensation Law employees who were participating, financing or directly interested in the labor dispute which resulted in their unemployment are disqualified from receiving unemployment compensation benefits except where, *inter alia,* employees were "denied the right of collective bargaining under generally prevailing conditions," W.Va. Code §21A-6-3(4) (1978). The determination of whether employees were denied the right of collective bargaining under generally prevailing conditions is made by an Appeals Tribunal of the West Virginia Unemployment Compensation Board of Review, reviewed by the Board of Review and subject to review by a state court. In applying Section 21A-6-3(4), these state authorities and state courts conduct an extensive review of an employer's conduct during collective bargaining, often focusing on whether the employer has committed an unfair labor practice under principles similar to those under the National Labor Relations Act, *e.g., Metalab-Labcraft Equipment Co. v. Board of Review,* 11 (CCH) Unemployment Ins. Rep. ¶8266 (W.Va. Cir.Ct. 1968), while at the same time taking the position that they are not bound by the NLRB's determinations as to whether those acts by that employer violated the NLRA. *Rolland Glass Co. v. Board of Review,* 11 (CCH) Unemployment Ins. Rep. ¶8262 (W.Va. Cir.Ct. 1967).

2. See West Virginia Code, Section 21A-5-7(3) (1978). Under the West Virginia Unemployment Compensation Law, employers have individual accounts to which contributions (a percentage of the total payroll) are credited and from which benefits are debited. *Id.* The employer's contribution to the account is experience rated based on the amount of money in the account versus the amount of benefits paid out of the account.

Statement of The Case.

On September 25, 1979, Westinghouse filed a verified complaint in the United States District Court for the Southern District of West Virginia against Respondents, Michael R. Wenger, Commissioner, West Virginia Department of Employment Security and L. F. McClanahan, Clarence Elmore and John T. Poffenbarger, members of the West Virginia Unemployment Compensation Board of Review. This suit sought, *inter alia,* a declaratory judgment that the portion of Section 21A-6-3(4) which provides for awards of unemployment benefits to striking employees when a state tribunal determines that they were "denied the right of collective bargaining under generally prevailing conditions" is unconstitutional because that portion of the statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (1976) (the "NLRA") and violates the supremacy clause of the United States Constitution, U. S. Const. art. VI, cl. 2. In addition to the request for a declaratory judgment, the suit sought an injunction against further proceedings by the state authorities regarding the award of unemployment compensation benefits.

After receiving oral argument and briefs from the parties, on September 28, 1979, the District Court, in a bench opinion, dismissed the complaint and held that Section 21A-6-3(4) was not preempted by the NLRA because it was part of a statute dealing with unemployment compensation and because the District Court believed that by reason of this Court's decision in *New York Telephone Co. v. New York State Department of*

Id. Thus, funds paid out of the account in the form of benefits are reflected in the employer's contribution rate. Therefore, benefits paid out of the account must be replaced by contributions by the employer.

Labor, 440 U.S. 519 (1979), the labor law preemption doctrine was inapplicable to the unemployment compensation area.

On October 2, 1979 and October 31, 1979, a West Virginia Unemployment Compensation Appeals Tribunal conducted a hearing on the unemployment compensation claims filed by the Fairmont production and maintenance employees. During this hearing the only testimony presented on behalf of the claimants was that of the IUE's chief national negotiator with Westinghouse and the President of IUE Local 627, the local which represents production and maintenance employees at the Fairmont plant. The unemployment compensation claims were solicited and prosecuted by the Union, not the individual claimants. The testimony of the Union witnesses was concerned exclusively with the conduct of the 1979 national collective bargaining negotiations between Westinghouse and the IUE and largely concerned events which transpired at Westinghouse plants other than Fairmont and outside the State of West Virginia. The Union claimed that the employer had committed, *inter alia,* the following unfair practices which it claimed should give rise to liability for unemployment compensation: (a) the alleged failure to present a "final proposal" as early as desired by the IUE; (b) the alleged failure to meet with the union on a particular day; and (c) a request to exclude a particular location from the national agreement. The IUE also filed a charge with the National Labor Relations Board claiming that these same alleged practices constituted an unfair labor practice under the National Labor Relations Act. In rebuttal, Westinghouse presented the testimony of two

of its principal labor negotiators who participated at 1979 national collective bargaining negotiations.[3]

Westinghouse filed in the District Court a Motion for Reconsideration of the Court's Denial of Injunctive and Declaratory Relief on October 10, 1979, together with an affidavit describing the testimony presented at the October 2, 1979 Appeals Tribunal hearing. On November 1, 1979, the District Court issued an order denying the Motion for Reconsideration and incorporated its prior bench opinion. (2b)

The District Court issued a Memorandum Order and Opinion and entered judgment dismissing the complaint on November 26, 1979. (7c) The District Court was of the opinion that although the West Virginia statute authorized adjudication of the propriety of an employer's practices during collective bargaining, that adjudication was permissible because the District Court read this Court's opinion in *New York Telephone* as holding that the preemption doctrine was totally inapplicable to the unemployment compensation area and that the states could award unemployment compensation benefits to

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3. On January 9, 1980, the Appeals Tribunal ruled that the claimants were disqualified from receiving unemployment compensation benefits pursuant to Section 21A-6-3(4) because they were not denied the right of collective bargaining under generally prevailing conditions, *In the Matter of William R. Bennett, et al. and Westinghouse Electric Corporation,* LD No. 79-236 (Jan. 9, 1980). The Board of Review affirmed, *In the Matter of William R. Bennett, et al.,* R. LD No. 80-1 (July 31, 1980). The claimants have petitioned for review of the Board of Review's decision, *William R. Bennett, et al. v. The Board of Review of the West Virginia Department of Employment Security, et al.,* No. 80-116 (Kanawha Cty., filed August 20, 1980), and that appeal is presently pending in the state court.

strikers on whatever basis they desired, including the determination that the employer had engaged in an unfair labor practice.[4]

In reaching the decision that Section 21A-6-3(4) is not preempted by the NLRA, the District Court, relying on this Court's decision in *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974), also ruled that the instant controversy would not be rendered moot by a favorable resolution for Westinghouse before the West Virginia Unemployment Compensation Appeals Tribunal, the Board of Review or a reviewing state court. It reasoned: ". . . the matter in conflict would be 'capable of repetition, yet evading review' even if the need for injunctive relief was rendered moot . . ." (2c) Similarly,

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4. The District Court reasoned:

"This Court views the *New York Telephone* case as explicating a congressional intent to leave the issue of the determination of eligibility for state unemployment compensation benefits to the states. Counsel for the Plaintiff contends that the statute involved in the New York Telephone case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case." (5c-6c)

the District Court declined to abstain from deciding the matter in conflict. (2c)

The District Court's determination that the present conflict "would be 'capable of repetition, yet evading review'," affirmed on appeal (2d), is substantiated by the fact that employees at the Fairmont plant have filed (on at least two occasions in the past) claims for unemployment compensation because Westinghouse purportedly denied them "collective bargaining under generally prevailing conditions." *Hawkins v. Westinghouse Electric Corporation,* No. 8362 (Group) (W.Va. UCBR) (unpublished opinion dated August 9, 1957), *Reynolds v. Westinghouse Electric Corporation,* No. 9585 (Group) (W.Va. UCBR) (unpublished opinion dated Jan. 7, 1948).

On appeal, the Fourth Circuit, in a per curiam opinion, affirmed. It stated: "... [f]inding no error in the district court's determination that *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979), is dispositive of this case, we affirm for reasons adequately stated in its opinion." (2a)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Federal Labor Law Preemption Principles Clearly And Consistently Established In Prior Decisions Of This Court.

The District Court and the Fourth Circuit have held that the states may adjudicate the validity of an employer's practices in collective bargaining and condition an award of unemployment benefits to strikers upon

said review of the employer's practices.[5] This type of review of an employer's labor practices constitutes *de facto* regulation of those practices. This is well evidenced by the present case wherein, if Westinghouse is ultimately held to have engaged in an improper practice in its national bargaining with the IUE, the State of West Virginia will make an award of approximately one and one-half million dollars to the claimants and against Westinghouse.

More importantly, however, the Fourth Circuit's decision conflicts directly with this Court's decisions in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) and *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979).

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5. In administering the provisions of the West Virginia Unemployment Compensation Law dealing with award of unemployment compensation to strikers, the West Virginia Authorities (first the state unemployment compensation administrative officials and then the state courts) conduct an extensive review of the employer's conduct in bargaining, not merely to ascertain whether there was bargaining but to determine whether the employer committed any acts or practices which the state authorities deem improper. *E.g., Rolland Glass Co., supra.* Moreover, West Virginia state courts have repeatedly recognized that, in applying the exceptions in Sections 21A-6-3(4), they are required to interpret and apply principles similar to those reflected in the NLRA. *E.g., Union Carbide Corp.,* 11 (CCH) Unemployment Ins. Rep. ¶8259 (W.Va. Cir.Ct. 1967); *Rolland Glass Co., supra; Metalab-Labcraft Equipment Co. v. Board of Review, supra.* Despite this recognition, however, state courts in West Virginia have often applied those principles in a manner which directly conflicts with the NLRB's interpretation of that act regarding the very same incident. *E.g., Union Carbide Corp., supra. See also* Petition, *infra* at 20-21.

Reasons For Granting The Writ.

In *Garmon,* this Court elucidated a principle of labor law preemption which has been the cornerstone for nearly all of the decisions in which state regulatory schemes have been found to be preempted by the NLRA.[6] This principle, that state efforts to regulate or to prohibit activity that is either protected by §7, prohibited by §8, or at least arguably so protected or prohibited, was ignored by the Fourth Circuit. Rather than applying the preemption analysis espoused by *Garmon,* the Fourth Circuit reasoned that this Court's decision in *New York Telephone* was dispositive of this case. This determination, however, conflicts squarely with this Court's admonitions in *New York Telephone* and with the decision in *Nash.*

In *New York Telephone,* petitioning employers lodged a preemption attack against the State of New York's unemployment compensation law under which, after an eight-week waiting period, striking employees receive unemployment compensation benefits from an insurance fund financed primarily by employer contributions. 440 U.S. at 523. In marked contrast to this case, there was no claim in *New York Telephone* that the State sought to regulate or prohibit any conduct subject to the jurisdiction of the National Labor Relations Board (the "NLRB") under §8 of the NLRA. *Id.* at 529, 532. In fact, under the statute involved in *New York Telephone,* benefits were payable to strikers regardless of the nature of their strike or the nature of the bargaining conduct of the employer. Thus, this Court, in a plurality opinion authored by Justice Stevens, joined by Justices White and Rehnquist, ruled that the

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6. *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519, 528-29 n.13, 14 (1979).

mere payment of unemployment benefits to striking employees is not preempted by the NLRA where such a state effort does not regulate or prohibit activity that is protected by §7 or prohibited by §8. The plurality based its decision on an absence of "compelling congressional direction" that "the Congress that enacted the NLRA in 1935, intended to deny the States the power to provide unemployment benefits for strikers." *Id.* at 540. Justice Brennan and Justice Blackman, joined by Justice Marshall, authored separate concurring opinions which refrained from joining the plurality's preemption analysis, but found, however, sufficient evidence of Congressional intent tolerating the interference or alteration of economic balance between employer and employee caused by an unemployment compensation statute such as New York's. *Id.* at 546, 549.

Unlike *New York Telephone,* however, there is neither "compelling congressional direction" nor any congressional intent here which allows states to regulate collective bargaining even through the administration of their unemployment compensation laws. In fact, the exact opposite holds true in the present case because there is "compelling congressional direction" that national collective bargaining be regulated and administered only by the National Labor Relations Board because Congress gave exclusive jurisdiction over such activity to that agency. 29 U.S.C. §158(a)(5). For this reason, the District Court and the Fourth Circuit could point to nothing more than this Court's decision in *New York Telephone* as evidence that the interference with collective bargaining, admittedly present in this case (6c), must be tolerated.

Significantly, however, the *New York Telephone* decision did not carve out a carte blanche exception to this

Court's labor law preemption doctrine for state unemployment compensation statutes. The decision was limited to a state unemployment compensation system which concedely did not serve to regulate the bargaining relationship between an employer and its employees, or to interfere with the NLRB's primary jurisdiction over the prohibitions in §8 of the NLRA. *Id.* at 528. It was for this reason that this Court recognized that ". . ., beyond identifying the interest in national uniformity underlying the doctrine, the cases comprising the main body of labor preemption law are of little relevance in deciding this case." *Id.* at 529, 530.

In addition, this Court's footnote 15 in the plurality opinion of *New York Telephone* and its reference to the *Nash* decision therein, strongly suggest that the main body of labor law preemption still has application to state unemployment compensation systems which regulate conduct prohibited in §8 of the NLRA.[7]

In footnote 15 in *New York Telephone,* this Court rejected the petitioning employers' claim that the NLRA forbids states from awarding unemployment compensation benefits to participants in illegal strikes. The petitioners were urging that this Court should adopt a rule

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7. *See* Comment, *Federal Preemption of State Welfare and Unemployment Compensation Benefits for Strikers,* 12 Harv. C.R.-C.L. L. Rev. 441, 459 n.86 (1977), which concludes that the payment of unemployment compensation benefits to strikers under an exception which awards benefits because an employer fails to conform to the provisions of a collective bargaining agreement or to laws regulating collective bargaining, such as Section 21A-6-3(4), does implicate *Garmon* as ". . . it involves them [the states] in precisely the same adjudicative process that is undertaken by the NLRB . . ." *Id.*

prohibiting a state from awarding benefits where the claimants were involved in an illegal strike. The Court rejected such an approach:

> "Because such a rule would inevitably involve the States in ruling on the legality of strikes under §8, it would invite precisely the harms that the preemption doctrine is designed to avoid." *Id,* at 529 n.15.

The Fourth Circuit's holding which permits the State of West Virginia to rule upon the legality of an employer's collective bargaining conduct under §8 of the NLRA permits the "same harms that the preemption doctrine is designed to avoid" and conflicts with this Court's decision in *New York Telephone* and *Garmon.* Thus, unlike *New York Telephone,* this Court is not being asked to extend the doctrine of labor law preemption into a new area because Section 21A-6-3(4), although its purported purpose relates only to unemployment compensation, *de facto* regulates activity within the central concern of the National Labor Relations Act.

For similar reasons, the decision below also conflicts with *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). In *Nash,* this Court held that the NLRA preempted a state policy of denying unemployment compensation benefits to employees who filed unfair labor practice charges against an employer because such a state statute constituted *de facto* regulation and restriction of an employee's federally protected rights under §7 of the NLRA. 389 U.S. at 238-39. The *Nash* decision illustrates that the preemption doctrine does apply to the unemployment compensation area when a state attempts (through the grant or denial of benefits) to regulate rights and conduct within the scope of the NLRA. The *Nash* decision thus holds that states do

not enjoy an unlimited and unrestricted right in the administration of their unemployment compensation systems, contrary to the position taken by the District Court and the Fourth Circuit.

The present case amply demonstrates how the State of West Virginia, under Section 21A-6-3(4), regulates the bargaining relationship between Westinghouse and the IUE, a matter which is properly within the NLRB's primary jurisdiction. The conduct of the unemployment compensation hearing before the Appeals Tribunal in this case, and the testimony heard at that hearing, illustrate that Section 21A-6-3(4) has the effect of regulating the bargaining relationship between Westinghouse and the IUE and interferes with the NLRB's exclusive jurisdiction over the prohibitions in §8 of the NLRA. That hearing dealt solely with the conduct of the 1979 national collective bargaining negotiations between Westinghouse and the IUE. Significantly, this led the District Court to conclude that:

> "... the determinations required to be made by the state officials under the West Virginia unemployment compensation statute are similar to or exactly the same as certain determinations that are made by the National Labor Relations Board under the National Labor Relations Act." 7c.[8]

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8. The District Court's recognition that the state is making the same or similar determinations that the NLRB makes under §8 of the NLRA also conflicts with this Court's decision in *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), where it is stated that the critical inquiry in labor law preemption cases is whether the controversy before the state tribunal is the same as that as would be presented to the NLRB. *Id.* at 197.

Not only are the same determinations to be made by the state authorities as made by the NLRB under the NLRA, but the one and one-half million dollars in unemployment compensation benefits which will be charged against Westinghouse, is certainly as regulatory of an employer's conduct as any award by the NLRB.

For the reasons set forth above, the District Court and the Fourth Circuit's decisions are contrary to this Court's prior decisions in *Garmon, Nash* and *New York Telephone.*

2. The Fourth Circuit Incorrectly Decided An Important Issue of Labor Law Preemption.

As set forth in the prior section, we believe that the Fourth Circuit's decision was an incorrect one. Moreover, that decision erred in respect to a very important legal question.

If the decision below stands as law, this Court's carefully constructed doctrine of labor law preemption will be severely undermined. The decision below rejects not only the legislative judgment in favor of a uniform federal labor policy but also the Congressional decision to entrust the primary interpretation and application of its rules to a centralized expert tribunal, i.e., the NLRB. *Garner v. Teamsters Union,* 346 U.S. 485, 490-91 (1953). Similar concerns have led this Court to recognize that "the overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized agency created by Congress not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in §8 of the Act, . . ." *New York Telephone,* 440 U.S. at 528 [Citations and footnote omitted].

Reasons For Granting The Writ.

This Court's concern for a uniform, nationwide interpretation of the NLRA has particular application in cases involving collective bargaining.[9] To permit the states to regulate conduct so plainly within the central aim of federal regulation presents a real and substantial danger of conflict between the power asserted by Congress and the requirements imposed by state law. As explained *supra* at 7-8, the IUE filed charges with the NLRB regarding the same matters which were the basis of their claims before the state unemployment compensation authorities, but the whole subject of the state proceedings herein has been the propriety of Westinghouse's bargaining practices. If the decision below stands, the states will have an unlimited and unrestricted right to regulate and monitor employers' collective bargaining practices through the application of purportedly neutral laws of general applicability,[10] such as the unemployment compensation system challenged here. Thus, employers would be subject to conflicting regulation of collective bargaining by state authorities and the NLRB.

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9. *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 137 (1976); *Garmon,* 359 U.S. at 490-91; *Baker v. Newspaper & Graphic Communications Union,* 628 F. 2d 156, 162 (D.C. Cir. 1980). *See also* Cox, *Labor Law Preemption Revisited,* 85 Harv. L.R. 1337-1339 (1972).

10. Section 21A-6-3(4) is not exempt from preemption because it is a law of general applicability or because its purpose is to provide for awards of unemployment compensation benefits. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), this court recognized that the stated purpose of a state statute is not dispositive for preemption purposes.

The potential for inconsistent regulation is real and substantial, not imagined. For example, the potential for inconsistent and divergent adjudications concerning collective bargaining made by the West Virginia unemployment compensation review tribunals, reviewing state courts and the NLRB has been conclusively demonstrated on many occasions. *Compare Union Carbide Corp.*, 11 (CCH) Unemployment Ins. Rep. ¶8259 (W.Va. Cir.Ct. 1967), *with Chemical Workers' International Union v. NLRB*, 405 F. 2d 1111 (D.C. Cir. 1968) where the Board of Review held that the employer had denied claimants the right of collective bargaining under generally prevailing conditions by insisting to the point of impasse on an allegedly improper, non-mandatory subject. The NLRB later ruled that that conduct did not violate the NLRA, *Union Carbide*, 165 NLRB 254 (1967), a decision which was affirmed by the United States Court of Appeals for the District of Columbia Circuit. 405 F. 2d at 1113. *See also Rolland Glass Co. v. Board of Review*, 11 (CCH) Unemployment Ins. Rep. ¶8262 (W.Va. Cir.Ct. 1967).

Requiring employers to conform their collective bargaining conduct to regulation by the states as well as by the NLRB undercuts the labor law preemption doctrine because it tolerates conflict in the regulation of collective bargaining. This result holds true particularly where, as here, an employer is engaged in nationwide operations and would be subject to regulation by many states.

At least six states have exceptions to the labor dispute disqualification provision of an unemployment compensation statute under which benefits are paid to otherwise ineligible strikers when an employer fails to

conform to laws regulating collective bargaining. Alaska Stat. §23.20 380(9)(c) (1972) ("failure or refusal of an employer to comply with an agreement or contract between the employer and the insured worker"); Ariz. Rev. Stat. Ann. §23-777(B) (1971) ("failure or refusal of an employer to conform to the provisions of an agreement or contract between employer and employee"); Mont. Rev. Codes Ann. §87-106(d) (1964) ("failure or refusal of any employer to conform to the provisions of any law of the states wherein the labor dispute occurs or of the United States pertaining to collective bargaining"); Pa. Stat. Ann. tit. 43, §802(b)(1) (Purdon Supp. 1979) ("no disqualification . . . shall be imposed if employees are denied the right of collective bargaining under generally prevailing conditions"); Utah Code Ann. §35-4-5(d)(1) (1974) ("failure or refusal to conform to the provisions of any law of the State of Utah or of the United States pertaining to hours, wages or other conditions of work"); W.Va. Code §21A-6-3(4) (1978).

Thus, employers could be subject to inconsistent and divergent regulation of collective bargaining from state to state. For example, one state might hold that one course of conduct should be followed by an employer in national bargaining, a second state might direct that another approach be taken, a third state might require a totally different approach, and the NLRB might hold that yet another inconsistent set of obligations exists. Thus, the same factual occurrences in a national bargaining situation (as was involved here) might be viewed differently by the different states and differently still by the NLRB. The approaches of the various states might be so inconsistent that a national employer such as Westinghouse may not be able to comply with one state's col-

lective bargaining requirements without violating those of another state or even those established by the NLRB.

The Fourth Circuit's interpretation of *New York Telephone* as sanctioning this interference with national labor policy and the erosion of the labor law preemption doctrine underscores the importance of reviewing this case. The decision below thus has a significant impact on the doctrine of labor law preemption. The dangers inherent in conflicting state regulation, the lack of state expertise and the frustration of national labor policy, which were not considerations before this Court in *New York Telephone,* 440 U.S. at 528-30, are of paramount concern here. The state statute involved in the *New York Telephone* case did not involve a situation in which the state was involved in the adjudication of whether unfair practices had been committed in the collective bargaining process. The decision below sanctions such adjudications by the state. Considerations of sound judicial administration of national labor policy justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. MCCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Bench Opinion

(reproduced from transcript of September 28, 1979)

Let me at the outset say that counsel have very adequately spoken, I think, to all the legal issues that might be before the Court. And I will try to summarize and address all the points that have been addressed by counsel.

Even though the counsel for the Board apparently only had notice last evening, she must have had opportunity to consult the authorities because I do consider those. And I consider many of those authorities to be appropriate to matters we spoke of here today.

Factually this case is, as I mentioned previously, distinguishable from the previously considered *FMC* case in that the action sought to be enjoined is apprehended by the parties in different ways, but it has not yet occurred. And there was a pending administrative

hearing before the Board of Review of the Department of Employment Security that is scheduled in the near future. So there is pending state action to be considered there.

Probably the first step in my analysis is whether or not there is a case or controversy and whether or not this dispute represented by the lawsuit, the subject matter of the lawsuit, is moot at the present time.

I would agree with counsel for the plaintiff that the dispute is not moot under the state of facts alleged, and that the *Super Tire Engineering Company* decision against MacCorkle would provide adequate support for that proposition. So there is a case in front of the court.

My next step in the analysis involves whether or not a temporary restraining order is appropriate under the circumstances. And in that I go to the relevant Fourth Circuit law that controls in this application for injunctive relief preliminary to the resolution of the litigation on the merits. And I refer the parties to the case of *Blackwelder v. Selig Furniture Company* and the *Fort Sumter* case, and more recent cases decided by the Fourth Circuit Court of Appeals.

In that regard I had to consider the irreparable harm that would accrue to the plaintiff if the injunctive relief is not granted at this time, and balance that against the irreparable harm that might accrue to the defendant if such relief is granted, then consider the possibility or the probability of the success on the merits from the plaintiff's standpoint, and also consider the public interest.

Okay. First, I have determined not to grant the temporary restraining order in this case on this basis:

That the irreparable harm cited by the plaintiff in this case, that is, the right, the asserted legal right to have these matters resolved by and under the jurisdiction of the National Labor Relations Act and the National Labor Relations Board.

The Court is not impressed with the assertion of the denial of the legal right. Obviously there would be some sort of opportunity at some point to assert that legal right. And factually I think that the implicit assertion that the litigation of some 1,700 claims before the Court of employment review would cause irreparable harm is one that just doesn't hold water.

The litigation process there obviously can be shortened somewhat by an agreed state of facts that would apply to most of the employees or most of the persons seeking to have a claim granted and that, I am sure, the Board could handle. I don't anticipate how it would handle it, but anyhow the inconvenience of litigation, a large number of claims, is not something that would present factual support for irreparable harm.

From the standpoint of the defendant, there are valid state policies which have been established and recognized for some period of time relating to the economic security of persons unemployed, however temporary. And the state legislature has addressed that on a number of occasions.

And, of course, the Executive Department of the government is committed to discharging the mandates of the legislature on a continuing basis to such employees. So anything that the Court might do at this point to upset or interfere with the orderly processes of the executive government would in my mind constitute a

relatively measurable amount of irreparable harm to the defendants in this case.

In the third regard, as to the possibility of success on the merits, I need only refer to the decision of the United States Supreme Court in the *New York Telephone* case. Even though that was only a plurality opinion, the United States Supreme Court has indicated a strong interest in not interfering in neutral state policies involving the economics of the employment relation and the decisions of the various states.

And so I think that the possibility of success on the merits, even with precise pleading, is somewhat remote in this case for the plaintiff.

The public interest, I think, would be served by the continuation of the status quo and to let the orderly state processes wind their way to conclusion.

Now, for that reason, I will not grant the application for the temporary restraining order or the injunctive relief at this time.

Now, as to the question of abstention, I am really addressing that to the merits, underlying merits of the controversy.

There has been asserted in this action an attack upon the language of the West Virginia statute on the basis that the language of the statute carries with it the opportunity to interpret an area of labor law which has been pre-empted by the NLRA and amending legislation enacted by the United States Congress, and that the supremacy clause of the United States Constitution would preclude the State of West Virginia addressing it in the manner that it has in the enactment of *W. Va. Code,* 1931, 21A-6-3, as amended, section, not subsection (4), but the entire section of the statute as amended.

Appendix A.

There are several principles that are involved here. As a broad principle, the *Younger* case apparently first articulated in a modern way that pending state proceedings should not be interfered with by way of injunction or otherwise by a federal forum if the opportunity exists to raise the federal constitutional question at some point in the state proceedings. That case has been recently reaffirmed and recognized in a broader and more general application in the 1979 decision rendered by the United States Supreme Court in the case of *Moore v. Sims*. And I think that decision has general applicability under the circumstances here.

I am aware of the decision of *Carter v. The City of Bluefield*. I am likewise aware of the fact that there have been at least several decisions in the state circuit where these cases are generally litigated as regards bringing them against some agency of the State of West Virginia, and that circuit now headed by Chief Judge McHugh and previously headed by Chief Judge Taylor, now deceased, is a circuit that is often given much weight and persuasiveness when you come around to the interpreting of the cases of the court of last resort, the Supreme Court of Appeals of West Virginia.

But, nevertheless, the *Carter* decision does not preclude a direct raising of the federal constitutional question in some proceeding before the state courts of general jurisdiction and the state court of appellate and original jurisdiction.

There are a number of ways under the judicial provisions of the West Virginia Constitution that such claims can be raised. And so I am not concerned that it cannot be raised before that forum.

And the question involved in this case is obviously one of compelling state interest which involves important state policy and one which should be resolved in the first instance as to both state and federal constitutional provisions by the Supreme Court of Appeals of West Virginia. And it has not so addressed that particular matter. And it ought to in the proper circumstances have that opportunity.

So I think that is reason enough to allow that matter to be presented to the West Virginia Supreme Court of Appeals. And I, the Court, would determine, based upon the present state of facts and considering that there is a state administrative proceeding which the Court considers to be a state proceeding to be pending, that the matter be resolved in the state forum in the first instance.

Now, as to the fourth matter, the Court normally, this Court would normally in any case where an abstention appears to have been validly raised abstain from resolving the issue but retain the matter on the docket to determine what, if anything, the state courts chose to do about the subject matter of the litigation. That would be my normal approach here.

But I would remind the parties that on a slightly different set of facts this Court, sitting in the Northern District of West Virginia, or addressing a Northern District of West Virginia case, has resolved this matter in a broad based ruling applying the plurality decision in the case of *New York Telephone Company* as to the basic matter raised.

And even taking the statement of facts as Mr. Post has precisely defined them before this Court, I still find

it to be indistinguishable from the thrust and the broad ruling that the Court handed down in the *FMC* case. And so the law of the Northern District of West Virginia rendered by this judge is asked to be, in effect, overlooked and ignored by this same judge sitting in the Southern District of West Virginia, or in a Charleston case. I think that might be confusing to the gentlemen who compose the Court of Appeals. And it is inappropriate because the attack was then and is now upon the facial validity of the statute in question. And though Mr. Post would say that the second exception under section 21A-6-3 would appear to be applicable, I do not think that a subsection of the statute, once attacked, is severable from that standpoint. The entire statute was before the Court in the Northern District case involving FMC at that point and it is now before the Court presently.

And so not being inclined to overrule this Court on a decision so recently made, this Court will stand on its previous ruling and await the outcome of the decision of the Fourth Circuit Court of Appeals in the other case. And I will thus not abstain and retain the case on the docket; rather I will abstain and dismiss this case on the merits and send it on its way.

Delivered by:
CHARLES H. HADEN II
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. MCCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Order

(filed November 1, 1979)

Plaintiff has moved the Court, by counsel, to reconsider the Court's previous denial of the Plaintiff's motion for injunctive and declaratory relief. In support of its motion, the Plaintiff has submitted to the Court the affidavit of Samuel O. Lemon, Jr., Assistant Director of Personnel Relations for Westinghouse Electric Corporation, which Plaintiff contends constitutes "new evidence."

Mr. Lemon states, *inter alia,* that he has participated in hearings conducted by the Appeals Tribunal of the West Virginia Department of Employment Security. In essence, Mr. Lemon's affidavit purports to demonstrate that, in determining the eligibility of Westinghouse employees for unemployment compensation benefits for the time period during which they were engaged in a strike against Westinghouse, the West Virginia officials are considering evidence, and will have to make determinations of the same nature as those that are made by the National Labor Relations Board. The Plaintiff contends that the character of the determinations made by the

state officials unlawfully injects the state into the Labor Management Relations field and as such is preempted by federal labor law.

The Court has considered this argument in ruling on the Plaintiff's prior requests for relief. The Court incorporates its previous ruling herein. The Court once again concludes that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of the determinations, and proceedings in general, is to determine the eligibility of strikers for unemployment benefits. The Court recognizes the logical force of the Plaintiff's argument. Nevertheless, the Court has concluded that, notwithstanding the type of determination made by state officials, the result is merely the granting or denial of unemployment benefits under state law and as such falls within an area that is not preempted by federal labor law but rather is left to the province of the states under the rule of *New York Telephone Company v. New York State Department of Labor,* ..... U.S. ....., 47 U.S.L.W. 4303 (U.S., March 21, 1979).

In accordance with the foregoing, the Court hereby ORDERS that the affidavit of Samuel O. Lemon be filed as a part of the record in this case. The Court further ORDERS that the Plaintiff's motion for reconsideration of the Court's denial of injunctive and declaratory relief is denied.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: 11/1/79
/s/ CHARLES H. HADEN II
Charles H. Haden II
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. McCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Memorandum Order and Opinion

(filed November 26, 1979)

In this action the Plaintiff requested the Court to grant injunctive relief in the form of a temporary restraining order to enjoin Defendants from conducting an unemployment compensation appeal tribunal proceeding pursuant to *West Virginia Code,* 1931, §21A-7-7, as amended, and also sought a declaratory judgment that *West Virginia Code,* 1931, §21A-6-3, is unconstitutional because it violates the Supremacy Clause of the Constitution of the United States. The Court heard the case at a hearing on September 28, 1979. The case was considered on the basis of the pleadings, affidavits, motions and memoranda of law as well as the arguments of counsel. This Order reflects the Court's bench rulings made at the September 28th hearing. Counsel for all parties ably briefed and argued their respective posi-

tions. The Court will not restate in this Order the various legal arguments asserted.

First, the Court found, despite the possibility that certain actions by the Defendants subsequently could render the case moot, that there is a subsisting case or controversy on the facts as alleged by the Plaintiff. Moreover, it appeared to the Court that the matter in conflict would be "capable of repetition, yet evading review" even if the need for injunctive relief subsequently was rendered moot by actions of the Defendants. See *Super Tire Engineering Company v. McCorkle,* 416 U.S. 115 (1974).

The Court also considered the Defendants' arguments that abstention was proper. Although the Court considered that abstention could have been appropriate in this case under certain circumstances, the Court's actions in addressing the merits of the request for injunctive relief as well as the merits of the declaratory judgment request, demonstrate that the Court did not abstain. Nevertheless, the Court did find that, under West Virginia law, the Plaintiff was not barred from obtaining a review of the constitutionality of the state statute in question from state courts of general jurisdiction.

The Court next considered the Plaintiff's motion for injunctive relief. Analysis of the competing interests, weighed in light of the applicable law in this circuit, led the Court to conclude that the injunctive relief should be denied. *Blackwelder Furniture Company v. Selig Manufacturing Company,* 550 F. 2d 189 (4th Cir. 1977); *Fort Sumter Tours, Inc. v. Andrus,* 564 F. 2d 1119 (4th Cir. 1977); *North Carolina States Ports Authority v.*

Dart Containerline Company, Limited, 592 F. 2d 749 (4th Cir. 1979).

The Plaintiff argued that the irreparable harm it would suffer should the Court deny the injunctive relief requested was: (1) that the Plaintiff would be denied its "legal right" to have this purported matter of labor management relations resolved by the National Labor Relations Board; and (2) that the Plaintiff would be required to litigate 1,700 unemployment compensation cases before the State Administrative Tribunal.

It did not appear to the Court that the Plaintiff would be denied its asserted legal right to have labor management relations problems resolved by the National Labor Relations Board. Although the actions of the West Virginia Department of Employment Security and the Board of Review obviously have a pragmatic and tangential effect on the legal rights of the Plaintiff, they in no way preclude the Plaintiff from asserting any such rights before the National Labor Relations Board. Moreover, the Court found that the Plaintiff's implied assertion that it would have to litigate 1,700 unemployment compensation claims before the State Administrative Tribunal to be without merit. There is no dispute that a single set of facts, and an identical legal-administrative set of principles, apply to the determination of all 1,700 claims. Further, all 1,700 claims could be, and probably would be, determined on that single set of factual legal contentions. Therefore, the Plaintiff would be exposed to the litigation of one real case, and not 1,700 cases, by the denial of the injunctive relief sought.

The Court found that the Defendants would suffer significant irreparable harm if the injunctive relief was

granted. The Court found that enjoining the ongoing state administrative process would be an undue interference with the orderly processes of the executive branch of the state government. Additionally, the granting of injunctive relief would interfere with the execution of valid state policies under a state statute that has been in effect for many, many years, and one which expresses the mandate of the state legislature.

The Court next considered the Plaintiff's probability of success on the merits in this case. The Court found that Plaintiff's likelihood of success on the merits was, in this Court's view, relatively slight because of the principles enunciated in Part III of the plurality opinion in *New York Telephone Company v. New York State Department of Labor,* ..... U.S. ....., 47 U.S.L.W. 4303 (U.S. March 21, 1979). This Court has interpreted the *New York Telephone* case as expressing a strong policy that state determinations of eligibility for state unemployment compensation benefits be left to the province of the states notwithstanding that they may otherwise pragmatically affect labor management relations.

Finally, the Court had to consider in the balance the "public interest". The Court found that the public interest is manifested by the policy of the State of West Virginia to provide unemployment compensation benefits to those persons whom the state deems eligible; and that the public interest is best served by allowing the unhindered continuation of orderly state processes aimed to insure the economic security of the citizens of the state. Accordingly, the Court found that the public interest was served by denying the injunctive relief sought.

Weighing the above four factors in the balance, the Court found that the balance was decidedly struck in

favor of the Defendants and, accordingly, the Court denied the Plaintiff's motion for a temporary restraining order.

Although the Court, upon the arguments of counsel, considered the applicability of abstention principles to this matter, it has previously, while presiding in the Southern District of West Virginia, ruled upon the constiutionality of the statute here in question. *FMC Corporation v. West Virginia Department of Employment Security, et al.,* Civil Action Number 79-0040-C(H) (N.D.W.Va. June 21, 1979). Accordingly, the Court likewise addressed the merits of the declaratory judgment sought by the Plaintiff.

Counsel for the Plaintiff attempted to distinguish this Court's ruling in the *FMC* case, both on the facts and also on the basis that the *FMC* case involved a different subsection of *West Virginia Code,* 1931, §21A-6-3, than that involved herein. Nevertheless, the Court found that, as applied to a challenge of the facial constitutionality of the statute, that the *FMC* case was indistinguishable. The subsection of the statute involved in the *FMC* case, as well as that involved in this case, both colorably affect the balance of labor management relations. That, of course, is the basis upon which the Plaintiff here, as well as the Plaintiff in the *FMC* case made challenges to the constitutionality of the state statute.

This Court views the *New York Telephone* case as explicating a congressional intent to leave the issue of the determination of eligibility for state unemployment compensation benefits to the states. Counsel for the Plaintiff contends that the statute involved in the *New York Telephone* case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the

preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case. Obviously, the granting of unemployment compensation benefits to strikers, as in the *New York Telephone* case, does have an actual and practical effect on the balance of labor management relations. This Court also recognizes that the determinations required to be made by the state officials under the West Virginia unemployment compensation statute are similar to or exactly the same as certain determinations that are made by the National Labor Relations Board under the National Labor Relations Act. Nevertheless, the intent and purpose of the West Virginia unemployment compensation statute is not to regulate, interfere with or upset the balance of labor management relations, but is to serve as a means of determination of eligibility for unemployment compensation benefits. Therefore, this Court holds that *West Virginia Code,* 1931, §21A-6-3, as amended, does not impermissibly intrude in the area of labor management relations that is preempted by federal labor law, and further, the statute does not violate the Supremacy Clause of the United States Constitution.

In light of the Court's foregoing rulings, there is no further relief that the Plaintiff has sought or may obtain from this Court, and, accordingly, the Court hereby ORDERS that the case be DISMISSED from the docket of this Court.

The Clerk is directed to send a certified copy of this Memorandum Order and Opinion to all counsel of record.

ENTER: 11/26/79
/s/ CHARLES H. HADEN II
Charles H. Haden II
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1025

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security,
J. F. McCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Parkersburg.
Charles H. Haden, II, District Judge.

Argued: July 9, 1980
Before: WINTER, BUTZNER and ERVIN, Circuit Judges
(filed September 15, 1980)

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Opinion of The Court

PER CURIAM:

Westinghouse appeals the district court's finding that *W. Va. Code* 21A-6-3(4) (1931) does not violate the Supremacy Clause of the Constitution of the United States. Finding no error in the district court's determination that *New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519 (1979) is dispositive of this case, we affirm for reasons adequately stated in its opinion. *Westinghouse Electric Corp. v. Wenger,* No. 79-3325-H(h) (S.D.W.Va. Nov. 26, 1979).

AFFIRMED.

Appendix E

Statutory Provisions Involved

National Labor Relations Act: Sections 8(a)(1), 8(a)(5), 8(d) and 10(a)

The pertinent statutory provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §151 *et seq.* (1976) are the following:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> * * *
>
> Section 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-

bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Appendix E.

Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

No. 80-955

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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SUPREME COURT, U.S.

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

MICHAEL R. WENGER, Commissioner, West Virginia Department of Employment Security, J. F. McCLANAHAN, CLARENCE ELMORE, and JOHN T. POFFENBARGER, Members of the Board of Review,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S MEMORANDUM REGARDING MOOTNESS

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W. Va. Code §21A-6-3(4)	passim

This action was commenced by Petitioner Westinghouse Electric Corporation ("Westinghouse") on September 25, 1979, seeking a declaratory judgment that insofar as W. Va. Code §21A-6-3(4) authorizes state authorities to scrutinize the propriety of an employer's bargaining conduct -- that state statutory provision is preempted. Petitioner also sought an injunction against proceedings which were about to commence before the West Virginia unemployment compensation tribunal. The district court dismissed Petitioner's Complaint because it read this Court's decision in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) as holding that the doctrine of preemption was not applicable in any respect to state unemployment compensation statutes. Petition at 8.

After three sets of state proceedings wherein Westinghouse's 1979 national collective bargaining negotiations were thoroughly scrutinized by, respectively, the initial state hearing examiners, the state board of review, and the state court, it has been determined finally by the state authorities that Westinghouse had not committed any unfair practice in its bargaining. Nevertheless, the constitutional issues raised by Westinghouse's request for a declaratory judgment continue to present a justiciable controversy. Any other conclusion would effectively preclude a judicial review of those constitutional issues even though Westinghouse's collective bargaining practices have been scrutinized by the West Virginia state authorities under said §21A-6-3(4) on three occasions in the past [1/] and continue to be subject to state scrutiny and

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1/ Petition at 10.

regulation in the future, in clear contravention of the federal labor preemption doctrine.

The West Virginia state authorities continue to regulate bargaining conduct by the development of rules as to acceptable practices in bargaining.[2/] Thus, even today they accomplish de facto regulation of collective bargaining practices of employers (including those of Westinghouse) by their awards of compensation to employees and the concomitant funding charges made against the level at which the "offending" employer must contribute to the state unemployment compensation fund. The in terrorem effect of the possibility of future awards by the state effectively regulates the bargaining conduct of employers such as Westinghouse. As a practical matter, this de facto regulation of conduct occurs even before a claim is submitted by a striker and before any proceeding is commenced against the employer. Under prior decisions of this Court, the fact that Westinghouse ultimately was able to show that its past bargaining here was conducted in accord with the state of West Virginia's requirements should not preclude Westinghouse from obtaining a declaratory judgment so that it will not be required to meet those state imposed collective bargaining standards in the future.

The applicable decisions of this Court interpreting the "case or controversy" requirement of Article III of the United States Constitution demonstrate that Westinghouse's challenge to the constitutionality of West Virginia's unemployment compensation statute has not been rendered moot by the

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2/ Petition at 19-20.

state's denial of benefits to Westinghouse employees. The basis for Westinghouse's challenge to the West Virginia statute is that it subjects the bargaining conduct of employers to scrutiny by state authorities and thus infringes upon the exclusive jursidiction of the National Labor Relations Board ("NLRB") to define an employer's bargaining obligations under the National Labor Relations Act, 29 U.S.C. §151 et seq. ("NLRA"). This improper act of state review of an employer's bargaining conduct occurs regardless of the ultimate decision reached by the state tribunal. Therefore, Westinghouse's right to challenge the constitutionality of the West Virginia statute is not contingent upon having suffered an adverse determination by the state authorities, because the interference with national labor policy occurs long before the state determination is made. Of course, at the time that Westinghouse brought and the District Court dismissed the Complaint herein, the request for an injunction against the present state proceedings was still "live" since the state's hearing upon the propriety of Westinghouse's bargaining practices and the award of unemployment compensation benefits was then pending.

This Court's decision in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) is directly relevant here. In Super Tire, employers brought an action for injunctive and declaratory relief against various New Jersey officials, alleging that the award of public assistance funds to striking employees through state welfare programs interfered with federal labor policy and was therefore preempted by the NLRA. Before the case was tried in the district court, the labor dispute ended and the employees returned to work. The Third Circuit held the case to be moot because the strike had ended and no injunctive or

monetary relief could be awarded. Only declaratory relief regarding future applications of the policy was at issue.

In reversing the Third Circuit's determination that the case had been rendered moot, this Court emphasized the distinction between actions which request only injunctive relief and those which also request a declaratory judgment, and ruled that a dispute which presents an issue that is "capable of repetition yet evading review" is not rendered moot by events that alleviate the immediate harm and make an injunction unnecessary. 416 U.S. at 122. After noting the relatively short-term duration of strikes and the fact that regardless of the duration of the strike the impact of the challenged state policies would continue unabated, this Court found that the employer's request for a declaratory judgment presented a concrete dispute which would enable the federal judiciary to make judgments and render appropriate relief affecting the rights and interests of the parties:

> If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review." . . . To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining arrangement, except one involving a fine or other penalty, could be adjudicated only rarely, and the purpose of the Declaratory Judgment Act would be frustrated. 416 U.S. at 125-26. 3/

3/ The instant case is an even stronger example of how the effects of an unconstitutional state policy or practice can survive the termination of the immediate dispute than the situation which existed in Super Tire. In Super Tire, the public assistance benefits were paid to striking

(continued on next page)

In addition to the decision in Super Tire, supra, this Court has, on numerous occasions, applied the "capable of repetition, yet evading review" standard in ruling that a case is not necessarily rendered moot by subsequent events. For example, in Roe v. Wade, 410 U.S. 113 (1973), this Court rejected the argument that a pregnant woman's challenge to the constitutionality of a state criminal abortion statute was rendered moot by the natural termination of the woman's pregnancy. Accord, Doe v. Bolton, 410 U.S. 179 (1973).

Similarly, in Moore v. Ogilvie, 394 U.S. 814 (1969), this Court ruled that an action challenging state election laws which requested declaratory and injunctive relief did not become moot after the election was held. Even though the injunctive relief requested by plaintiffs could not be granted after the election, the fact that the state maintained the same election system reflected a "continuing controversy in the federal-state area." 394 U.S. at 816. See also United States v. New York Telephone Co., 434 U.S. 159, 165 n.6 (1977); Carroll v. President & Commissioners, 393 U.S. 175, 178-79 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953).

3/ (continued from previous page)

employees regardless of the employer's conduct or bargaining practices. Thus, once the strike ended, there was no effect upon an employer's future bargaining practices, since the assistance fund payments also ended. In the instant case, on the other hand, Westinghouse continues to be subject to the state scrutiny of its bargaining practices after the employees have returned to work, and this potential of state scrutiny necessarily continues to affect the present and future bargaining conduct of Westinghouse.

More recently, in County of Los Angeles v. Davis, 440 U.S. 625 (1979), this Court set forth the test for determining if a case has been rendered moot as follows:

> [J]urisdiction, properly acquired, may abate if the case becomes moot because
> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur . . . and
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation . . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. 440 U.S. at 631.

With respect to the first of those criteria for judging mootness, it is clear that there is every reason to believe that the unconstitutional infringement by the West Virginia unemployment compensation statute upon the NLRB's exclusive jurisdiction to scrutinize the propriety of bargaining practices will recur. The instant case is the third time that Westinghouse has been required to justify the propriety of its national collective bargaining practices to West Virginia authorities as a result of unemployment compensation claims filed by striking employees at the Fairmont, West Virginia plant. Petition at 10. Moreover, the Respondents have blithely asserted to this Court that even if the NLRB makes a determination as to the propriety of an employer's bargaining conduct in a given situation, the state authorities are free to reach a different conclusion under the same facts and are not affected by the NLRB's conclusion that an employer has satisfied its

bargaining obligations under the NLRA.[4/] These facts demonstrate that Westinghouse, as well as other employers in the state of West Virginia, will continue to be exposed to the threat of state scrutiny of collective bargaining practices in the future, as well as to conflicting standards for collective bargaining conduct to be separately developed by the NLRB and the state.

It is equally clear that interim events -- in this case, the denial of benefits to Westinghouse employees who were on strike -- have not "completely and irrevocably eradicated the effects" of West Virginia's unconstitutional interference with the development of a uniform national labor policy. In fact, as discussed above, the ultimate decision as to whether those employees are eligible for benefits is essentially irrelevant to the fact that Westinghouse continues to be required to justify the propriety of its bargaining conduct to West Virginia authorities (or, for that matter, to any other state that desires to regulate collective bargaining under its unemployment compensation laws). The effects of this state interference with national labor policy will continue to be felt by Westinghouse each time it enters into collective bargaining negotiations, because its negotiators will not only be required to conform to federal standards for good faith bargaining, but will also be required to meet state standards or face the risk of exposing the company to massive unemployment compensation benefit liability.

4/ See Response to Petition at 15.

For these reasons, the instant case presents a live controversy notwithstanding the decision of the West Virginia circuit court upholding the denial of benefits to Westinghouse's striking employees. As this Court recognized in decisions such as Super Tire, supra, and Roe v. Wade, supra, actions for declaratory relief are not rendered moot by interim events if meaningful judicial review would be unavailable because of the nature of the injury alleged. In the instant case, the injury which flows from the West Virginia unemployment compensation statute is not merely the economic cost of an adverse determination as to the employees' eligibility for benefits, but also includes the effect upon an employer's collective bargaining practices caused by exposure to varying and possibly conflicting standards of bargaining. Because this latter effect is a continuing one, Westinghouse's challenge to the constitutionality of W. Va. Code §21A-6-3(4) has not been rendered moot by the state's denial of benefits to the Westinghouse employees.

Accordingly, we believe that this Court should take review of this case in order to resolve the conflict between the West Virginia statute, which directs the state authorities to determine whether employees have been "denied the right of collective bargaining under generally prevailing conditions," and the NLRA, which commits such determinations to the exclusive jurisdiction of the NLRB.

CONCLUSION

For the foregoing reasons and on the basis of the foregoing authorities, Westinghouse respectfully submits that this case is not moot. Westinghouse prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter P. DeForest, III, counsel of record for Petitioner Westinghouse Electric Corporation and a member of the Bar of the Supreme Court, hereby certify that a true and correct copy of Petitioner's Memorandum Regarding Mootness has been mailed, this 4th day of June, 1981, by first-class mail, postage prepaid, to the following counsel:

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All parties required to be served have been served.

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MICHAEL R. WENGER, Commissioner
West Virginia Department of Employment
Security, J. F. McCLANAHAN, CLARENCE
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Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Respondent, Michael R. Wenger, Commissioner, West Virginia Department of Employment Security, J. F. McClanahan, Clarence Elmore, and John T. Poffenbarger, Members of the Board of Review, respectfully pray that the Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 15, 1980 be denied.

COUNTER STATEMENT OF THE QUESTION

Whether the District Court was correct in ruling that the W. Va. Code §21A-6-3(4), which Section provides that individuals are entitled to unemployment compensation benefits while on strike if they fall under the exceptions contained therein, is not unconstitutional under the doctrine of federal preemption because its purpose is to provide for the payment of benefits and not the regulation of collective bargaining.

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CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary nothwithstanding.

STATUTES INVOLVED

Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W. Va. Code §21A-6-3(4) (1978), provides for the payment of unemployment compensation benefits to striking employees after a state unemployment compensation Appeals Tribunal, the West Virginia Unemployment Compensation Board of Review, or a reviewing state court determines that an employer has denied employees the right of collective bargaining under generally prevailing conditions:

§21A-6-3. Disqualification For Benefits.

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits:

> (4) For a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed, unless the commissioner is satisfied that he was not (one) participating, financing, or directly interested in such dispute, and (two) did not belong to a grade or class of workers who were participat-

ing, financing, or directly interested in the labor dispute which resulted in the stoppage of work. No disqualification under this subdivision shall be imposed if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or *if employees are denied the right of collective bargaining under generally prevailing conditions,* or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions. (Emphasis Supplied)

STATEMENT OF THE CASE

The procedural history of this case as set forth in the Petition filed on behalf of Westinghouse is essentially correct. The real parties in interest in this case, viz., The International Union of Electrical, Radio and Machine Workers, members represented by Westinghouse at its Fairmont, West Virginia plant were not made parties because of the nature of this litigation; that is, this action was brought to enjoin the State from holding a hearing in the first instance and to further declare the State law unconstitutional.

The Commissioner of the West Virginia Department of Employment Security was made a defendant in this action because he is a party to all matters before the Board of Review by virtue of the West Virginia statutory provision contained in W. Va. Code §21A-7-8. The Board of Review of the West Virginia Department of Employment Security is an independent tribunal created by the West Virginia Code §21A-4-1, et seq., whose members are appointed by the Governor.

This Response is, therefore, filed on behalf of the parties who have no direct financial interest in the outcome of this litigation. The Commissioner of the Department of Employment Security submits this brief because he was sworn to uphold the laws of the State of West Virginia and he must therefore defend the constitutionality of the law which he has sworn to administer. The Board of Review appears herein since Westinghouse has sought to enjoin it from proceeding to hear this case in accordance with the procedure dictated by the W. Va. Code.[1]

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1. The procedure for hearings by an appeals tribunal is set forth in W. Va. Code 21-7-7a.

Statement of the Case

It is noteworthy that the Appeals Tribunal of the Board of Review on January 9, 1980 rendered a decision in this case denying benefits to the members of the International Union of Electrical, Radio and Machine Workers employed by Westinghouse at its Fairmont, West Virginia plant.[2] This decision was affirmed by the Board of Review on July 31, 1980.[3] Therefore, unless the Circuit Court of Kanawha County where this matter is presently pending on appeal reverses the decision of the Board of Review, the account of Westinghouse would not

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2. "It is stipulated that the claimants participated, financed and were directly interested in the labor dispute involved, and that they belonged to a class or grade of employees who were participating, financing, and/or were directly interested in the labor dispute."

The language of the above stipulation generally paraphrases the disqualifying language for benefits, as contained in Paragraph (4), Section 3, Article 6, Chapter 21A, of the West Virginia Code.

But, it is the contention of Claimants that no disqualification under the above subdivision should be imposed because of the exception to the rule that the "employees are [were] denied the right of collection bargaining under generally prevailing conditions . . ."

Whereupon, as the lengthy and complex testimony cannot in brevity be re-stated, it is ruled that the exception is here found not to prevail so as to overcome the general rule of disqualification.

The Employer's written "Motion To Correct Record" together with supportive affidavits thereto by John F. Frantz, William A. Towle and Lee D. Bellmer, are received, filed herein, and made a part of the record. Further, the Post-Hearing Brief of the Employer was timely received and is filed herein.

The claim for unemployment compensation benefits is denied. Claimants are disqualified pursuant to Paragraph (4), Section 3, Article 6, Chapter 21 of the West Virginia Code.

This, the 9th day of January, 1980." Appeals Tribunal Decision, L.D. Case No. 79-236 (Group)

3. In the matter of William R. Bennett, et al, R LD No. 80-1 (July 31, 1980).

be charged with the unemployment compensation benefits and, thus Westinghouse will have sustained no monetary loss whatsoever.

Although the defendants do not challenge the Statement of Facts in the brief filed on behalf of Westinghouse, it should be noted that the evidence in this case has been entirely developed by Westinghouse based upon its pleadings, affidavits filed, and argument of counsel. No answer has been filed in this case nor has there been any evidentiary hearing on the merits of the injunctive relief sought.

REASONS FOR DENYING THE WRIT

1. The District Court Was Correct In Holding That The Federal Labor Law Preemption Doctrine Has No Application To The Right Of The States To Determine Whether Striking Employees Are Entitled To Unemployment Compensation Benefits Under State Law.

W. Va. Code §21A-6-3(4) which provides for the payment of benefits upon determination that the employer has denied its employees "the right of collective bargaining under generally prevailing conditions", is not preempted by the National Labor Relations Act and is not unconstitutional.

W. Va. Code §21A-6-3(4) was enacted as part of the unemployment compensation program, which program was enacted in 1936, to take advantage of the provisions of Title IX of the Social Security Act and is thus part of a federal-state program which is not subject to the doctrine of federal preemption. The decision of the United States Supreme Court in a recent case of *New York Telephone Company* vs. *New York Department of Labor*, 440 U.S.

519 (1979) held that although the unemployment compensation statutes of the several states conflict with federal labor policy, the legislative history of the National Labor Relations Act and the Social Security Act indicate that Congress was aware of and had decided to tolerate this conflict. Further, if Congress had intended to prohibit the states from paying unemployment compensation benefits to individuals on strike, it could have done so and not left this vital decision to the various state legislatures.

The general purpose of the West Virginia Unemployment Compensation law is not to regulate the bargaining relationship between labor and management but to provide a means of employment security in the State. A determination by the State with respect to whether or not it will pay benefits in a given situation does not infringe upon the right of National Labor Relations Act.

Generally, in West Virginia the law provides that when individuals go on strike, they are disqualified from receiving unemployment compensation benefits.[4] However, the West Virginia law contains several exceptions to the foregoing rule and the exception challenged herein provides that striking employees are not disqualified from benefits if they have been denied "the right of collective bargaining under generally prevailing conditions".

Labor law preemption is a doctrine designed to give effect to the supremacy clause, U. S. Constitution Article VI, which declares that the Constitution, laws and treaties of the United States "shall be the supreme law of the land". As such, application of the doctrine in the end depends upon the intent of Congress. Certainly when

4. W. Va. Code §21A-6-3(4)

enacting a law, Congress indicates that it sees no conflict between that law and state legislation or that it is willing, for whatever reasons, to tolerate any possible conflict, it cannot be said that the "supremacy" of federal laws is threatened by particular state action. The doctrine of labor law preemption invoked by the employer—a claim that the NLRA supercedes and invalidates the West Virginia legislation—is implied[5] from the federal labor laws. See *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 285-7 (1971); *New York Telephone*, 59 L.Ed.2d at 569, 99 S.Ct. at 1341. It is, consequently, entirely a creature of legislative history.[6].

Contrary to the assertion of Westinghouse's Petition, the West Virginia statutory provision, which sometimes permits the payment of unemployment compensation benefits to striking employees, neither frustrates the operation of the federal program nor creates a substantial risk of conflict with the policies of the Federal Labor law. This law was enacted for the sole purpose of permitting the payment of benefits, whereas, the National Labor Relations Act as designed to regulate collective bargaining. While Congress desired uniform application of labor-management relations under the National Labor Relations Act, it did not have the same view with respect

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5. The Court noted repeatedly through the *N. Y. Telephone* decision that the doctrine of preemption sought to be applied is *implied* from the NLRA. The Employer's authorities do not even suggest any application of any *express* preemption in the present case. Note the repeated references to the concept of "implied preemption" is throughout the opinion at 59 L.Ed.2d at 557, 561, 564, 570-71, 99 S.Ct. at 1331, 1334, 1337, 1342-3 and the statement of the Court that "much of the doctrine is of limited relevance in the present context . . ." 59 L.Ed.2d at 561, 99 S.Ct. at 1334.

6. The Employer does not, and could not, contend that any doctrine or express preemption is involved in this case.

to the unemployment compensation laws which emanated as a concomitant of the Social Security Act.

Westinghouse's petition cites in support of its pre-emption argument the decision of the Supreme Court in the case of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). *Garmon* is not applicable to the situation presented herein because this decision did not involve State unemployment compensation laws but rather matters clearly within the purview of the National Labor Relations Act. Moreover, *Garmon* was decided in 1959, over twenty (20) years ago, and involved the issue of whether the California Court could rule on an issue involving peaceful picketing by unions who had not been certified as bargaining agents by the employer. Therefore, this case clearly involved an issue addressed by the National Labor Relations Act which could be resolved by the National Labor Relations Board and is clearly distinguishable from the issue presented herein involving the payment of unemployment compensation benefits to striking employees. Furthermore, in *Garmon* the Court was required to make a determination involving priority of a state law and a federal law whereas, here we have a direct confrontation between two federal laws.

The Petition filed on behalf of Westinghouse states that the State of West Virginia will make an award of one and one-half million dollars against Westinghouse, which statement is misleading for two reasons. First, the action pending in state court must be reversed because, if affirmed, Westinghouse's account will not be charged under West Virginia law.[7] Moreover, even if the Circuit

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7. W. Va. Code 21A-7-11 provides: "Benefits found payable by decision of a deputy, appeal tribunal, the board or court shall be immediately paid in accordance therewith up to

(Footnote continued on next page)

Court reverses, Westinghouse will not have to actually pay any of this amount. The only impact of such a decision will be the effect on Westinghouse's merit rate account at some future date. Currently, and in the foreseeable future, there will be no financial impact on Westinghouse since all West Virginia employers are required to pay the same rate because of insolvency of the Unemployment Compensation Trust Fund.

In recognition of the strength of the Supreme Court ruling in *New York Telephone*, counsel for Westinghouse attempts to distinguish that decision from the case at bar. The background for the strike involved in *New York Telephone* and the background involved in the strike herein have similarities.[8]

(Footnote continued)
the week in which a subsequent appellate body renders a decision, by order, finding that benefits were not or are not payable. If, at any appeal stage, benefits are found to be payable which were found before such appeal stage to be not payable, the commissioner shall immediately reinstate the payment benefits. If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner shall recover such amount by civil action or in any manner provided in this Code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full. If the final decision in any case determines that the claimant was not lawfully entitled to the benefits paid to him pursuant to a prior order, any benefits so paid pursuant to such prior order, shall not be chargeable to the employer's account."

8. The goal of the New York strike was to disassociate the New York units of the CWA from the nationally settled upon contract and to dislodge petitioners from the "pattern" bargaining format long used by Bell affiliates. Under that format, management and International CWA officials would select two Bell affiliates with early contract expiration dates and would attempt to reach a settlement at both, which would then be

(Footnote continued on next page)

Reasons for Denying the Writ

There is no real distinction between the New York Unemployment Compensation law considered in *New York Telephone* and the West Virginia Unemployment Compensation law considered herein since both of these statutes achieve the same end result, that is, the payment of benefits to individuals on strike in certain instances, which payments admittedly has the effect of altering the balance of economic power in collective bargaining, which is the real complaint of the plaintiff.

The District Court in *New York Telephone* held that the payment of benefits to striking employees conflicted with the policy of free collective bargaining established in the federal labor laws and was therefore, invalid under the supremacy clause of the Constitution. This decision was reversed by the Second Circuit but not on the basis of the District Court finding. The reversal was on the theory that since Congress had not expressly forbidden unemployment compensation benefits for strikers, this was a conflict which Congress decided to tolerate.

(Footnote continued)
used as the basis for the contracts at all Bell units around the country. In order to "break the pattern", the New York CWA units refused to ratify the pattern agreed upon by the International CWA and the pattern-setting affiliates during the week-long national strike in July, 1971, and most members of the New York units remained on strike. Although the International originally opposed the continuation of the strike, it eventually lent its support. The strike was settled when petitioners agreed to a modest, but precedentially significant increase in wage benefits over the national pattern. 434 F.Supp. 810, 812-14 and n. 3 (SDNY 1977).

In this case the union representatives, Messrs. Vingle and Shaffer testified that Westinghouse had, in their view, bargained in bad faith during 1979 national negotiations by refusing to provide certain information to the IUE, by delaying its contract proposals until July 9, 1979, by insisting on "take-away" proposals and by requesting that Westinghouse's Charlotte, North Carolina plant not be included in the national collective bargaining agreement.

In March of 1979, this Court affirmed the Court of Appeals and ruled that the New York Unemployment Compensation law which permits the payment of benefits to strikers after the expiration of eight (8) weeks, was not subject to the doctrine of federal preemption. In addressing this issue, this Court examined the reasons underlying the doctrine of labor law preemption and recognized a national uniformity in the regulation of collective bargaining. In *New York Telephone*, it was found necessary to distinguish two (2) cases which had held that Congress intended to forbid State regulation of economic warfare between labor and management.[9]

In *New York Telephone*, this Court decided that unemployment compensation cases were distinguishable from the main body of labor preemption cases:

> ". . . the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public . . . the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State . . ."

In Part III of the Opinion after detailing the history of Title IX of the Social Security Act and the National Labor Relations Act and noting that these two (2) statutes were considered in Congress at the same time and were enacted within five (5) weeks of one another, the Court concluded that Congress was aware of the

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9. See *Teamsters* v. *Morton*, 377 U.S. 252; *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and discussion in *New York Telephone*, 440 U.S. pp. 530-533

impact of unemployment benefits on the bargaining process.

> "Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments."

That finding set the stage for the preemption ruling:

> "In all events, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress . . . In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power . . ." 440 U.S. at 545, 546.

From the foregoing, it is clear that the primary concern of the Court was the effect of unemployment compensation benefits on the outcome of a labor dispute.

Therefore, State-federal unemployment programs—whether enacted by West Virginia, New York or any other state—are simply not subject to preemption notwithstanding the fact of employer charges that payment of benefits to strikers alters the labor-management balance.

The differences between the West Virginia and the New York statutes are encompassed within the broad

discretion granted to the states and the substantial diversity of the state programs contemplated by Congress in 1935. Under the New York program, all employees are entitled to benefits after eight (8) weeks, whereas, under the West Virginia scheme, individuals on strike are only entitled to benefits if they are being denied the "right of collective bargaining under generally prevailing conditions." The Petition filed on behalf of Westinghouse contends that the West Virginia law serves to regulate the actions of the employer in collective bargaining. This argument is founded upon the theory that the West Virginia provision amounts to some sort of labor-management regulatory program. The West Virginia statute, as well as the New York law, were enacted for the sole purpose of promoting economic security of unemployed individuals within the respective states.

Therefore, much like the New York statute, "the general purpose of the program is . . . [to] provide an efficient means of insuring employment security in the State." *New York Telephone,* 440 U.S. at 533.

The West Virginia program, like the New York program, is funded with public funds.[10]

> "As this court held in a related context, such unemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate public purpose." 440 U.S. at 534.

Even though the New York statute makes the struck employer rather than all employers "primarily responsi-

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10. The funding provisions of the West Virginia statute, 21A-5-4 et seq., W.Va.C., are similar to the New York provisions discussed in *New York Telephone,* 440 U.S. at 524 and 525.

ble for financing striker benefits, the employer-provided monies are nonetheless funnelled through a public agency, mingled with other—and clearly public—funds, and imbued with a public purpose".

The West Virginia program, just like the New York program:

> ". . . differs from State statute expressly regulating labor-management relations for another reason. The program is structured to comply with the federal statute, and as the consequences financed, in part with federal funds . . . More importantly, as the Court has pointed out in the past the federal statute authorizing the subsidy provides *additional evidence of Congress' reluctance to limit the States' authority in this area.* 440 U.S. at 536. (Emphasis supplied)

The West Virginia Unemployment Compensation law was initially enacted by the legislature in 1936, to benefit from Title IX of the Social Security Act of 1935. The gross similarities of the West Virginia and New York programs—including the circumstances that both were enacted to compliment and benefit from the 1935 Social Security Act, the method of financing and providing benefits and the eligibility criteria—all document the likeness of the West Virginia program to the New York program and, consequently, the applicability of *New York Telephone.*

Counsel for Westinghouse relies upon footnote 15 in *New York Telephone* as strongly supporting his position that the main body of labor law preemption has application to State Unemployment Compensation programs. In this connection, it is submitted that this Court properly rejected the claim that the National Labor Relations Act forbids states from awarding unemployment compen-

sation benefits to participants in illegal strikes. It follows that this same reasoning should prevail here where the employer is claiming that the National Labor Relations Act forbids states from awarding unemployment compensation benefits to participants in strikes where the employer refused to bargain in good faith.

The contention in Petitioner's argument that the holding of the Fourth Circuit permits the State of West Virginia to rule upon the legality of the strike is not justified. An examination of the record indicates that at no time does the issue of legality of the strike ever appear in this case.

Counsel for Westinghouse relies upon the case of *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), which case involved the reverse of the states position which is presented herein. In *Nash*, Florida denied unemployment compensation benefits because the claimant filed unfair labor practice charges under the National Labor Relations Act. This decision stands for the proposition that the right of benefits under state law should not be affected by proceedings pending before the National Labor Relations Board which is precisely the position taken by the State in this proceeding. That is, the right to unemployment compensation benefits under State law is not affected by the National Labor Relations Act. If the National Labor Relations Board makes a different determination under the same set of facts, they would not affect the validity of the State decision.

In concluding its preemption argument, Petitioner again asserts that the West Virginia statutory provision, Section 21A-6-3(4), under consideration herein, regulated the bargaining relationship between Westinghouse

and IUE. Again, it is submitted that an examination of the bargaining conduct by a hearing tirbunal in order to determine the right to unemployment benefits does not *per se* amount to regulation. The Petition alleges that the charge of one and one-half million dollars in unemployment benefits against Westinghouse is regulatory of its conduct. It is urged that if the award of benefits is the thrust of the regulation, then what is the distinction between the case now before the Court and *New York Telephone*. In *New York Telephone* the right of striking employees to receive benefits was upheld by this Court.

In sum, it is submitted that the District Court and the Fourth Circuit properly applied the rationale of *New York Telephone*.

2. The Fourth Circuit Correctly Decided The Issue Of Labor Law Preemption.

In this section of his argument, counsel for the Petitioner expresses his concerns with respect to the far-reaching effect of the decision of the Fourth Circuit. He maintains that there should be a uniform interpretation of the NLRA as it relates to collective bargaining. Again, it is submitted that the authorities cited to support this contention were distinguished in *New York Telephone*.

Petitioner further asserts that if the decision of the Fourth Circuit stands, the states will have an unlimited right to regulate collective bargaining through the unemployment compensation system, thus subjecting employers to conflicting regulation of collective bargaining. To the contrary, even if Court of Appeals decision amounts to regulation by the states which it does not, the decision will have little impact except in West Vir-

ginia. West Virginia is one of two states that contain an exception to the labor dispute disqualification if employees are denied the right of collective bargaining. Petitioner in support of its assertion of far-reaching effect, can find only six states (West Virginia and Utah included) which will be affected by this decision.

Petitioner complains that the Fourth Circuit's decision will subject it to divergent regulation of collective bargaining from state to state. This is true with respect to any issue wherein the states are permitted to enact their own programs. There are countless areas where regulations differ significantly from state to state not only in unemployment compensation but other areas as well. If we accept the ruling of *New York Telephone* that the issue of whether or not striking employees are entitled to unemployment benefits was left to the various states, then we must accept the result of divergent regulation by the states.

Finally, Petitioner alleges that the *New York Telephone* decision does not control this case because of the difference between the New York statute and the West Virginia statute. In this connection, the reasoning of Judge Haden in the District Court opinion best expresses Respondent's position.

> "Counsel for the Plaintiff contends that the statute involved in the *New York Telephone* case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment com-

pensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case."

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should not issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-~~1025~~ 955

WESTINGHOUSE ELECTRIC CORPORATION

Petitioner

vs.

MICHAEL R. WENGER, Commissioner
West Virginia Department of Employment
Security, J. F. McCLANAHAN, CLARENCE
ELMORE, and JOHN T. POFFENBARGER, Members
of the Board of Review,

Respondent

RESPONDENTS' MEMORANDUM ON THE QUESTION OF WHETHER THIS CASE IS MOOT

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The question of whether this case was moot was originally raised by the undersigned in oral argument before Judge Haden on September 28, 1979 in Parkersburg, West Virginia in response to the application for a temporary restraining order filed on behalf of Westinghouse Electric Corporation. At the conclusion of the argument, Judge Haden, in his decision from the Bench, dismissed Respondents' argument that the case was moot relying upon the decision of this Court in the case of MacCorkle v. Super Tire Engineering Company, 416 U. S. 115, 40 L Ed 2d 1 (1974). Thereafter, Judge Haden ruled in favor of the Respondents position on the merits, which decision of the District Court was later affirmed by the Court of Appeals. Since the Respondents have prevailed on the merits in this matter, the question of mootness has not been advocated as a major issue.

In the argument before Judge Haden, the rationale for the mootness argument was that if the Appeals Tribunal refused to recognize the position advanced on behalf of the members of Local 627 of the International Union of Electrical, Radio and Machine Workers, that is, that they were denied the right of collective bargaining under generally prevailing conditions, and if the Appeals Tribunal then so ruled, then there would be no justiciable controversy. Judge Haden's bench ruling was made on September 28, 1979 and it was not until January 9, 1980 that the Appeals Tribunal ruled on the factual question and denied benefits to the members of the striking union. Thereafter,

this decision was affirmed by the Board of Review on July 31, 1980 and at the present time, the question has been appealed to the Circuit Court of Kanawha County, which Court has not made a decision as of this date. Thus, the present status of this case with respect to the question of mootness is considerably different than it was at the time Judge Haden made his ruling because at that time, there had been no decision by the Appeals Tribunal or the Board of Review in favor of Westinghouse. If the Circuit Court does not reverse the decision of the Board of Review, the account of Westinghouse would not be charged with unemployment compensation benefits and, as a consequence, Westinghouse will have sustained no monetary loss. Therefore, it is contended that at the present time and unless and until the Circuit Court reverses the Board of Review's decision, the issue presently before the Court is moot. Furthermore, it is submitted that the decision in Super Tire, supra, is clearly distinguishable from the factual situation presented herein.

In Super Tire, the workers were engaged in an economic strike and under the law of New Jersey, strikers are eligible for public assistance under the State Welfare program. Here, the workers were also engaged in an economic strike and under certain exceptions promulgated in West Virginia Code 21A-6-3(4), they are entitled to unemployment compensation benefits if they can demonstrate they have been denied the right of collective bargaining under generally prevailing conditions. Thus, both cases involved the question of whether strikers

were entitled to benefits under State law.

The argument advanced by the Employers in Super Tire was that the striking workers were not entitled to State Welfare benefits because the regulations awarding such benefits conflicted with Federal Labor policy expressed in the National Labor Relations Act. This is essentially the same position advanced by Westinghouse in this case. In Super Tire, before the case was heard, the labor dispute was settled and the strike ended. Here, the employees at Fairmont were on strike from July 31, 1979 to August 30, 1979. Thus, the strike was settled prior to the first hearing which was held on September 28, 1979.

In both Super Tire and this case, the District Court rejected the contention that the case had been mooted but then dismissed the complaint on the merits holding that the challenged laws did not violate the supremacy clause of the United States Constitution. In Super Tire, the Court of Appeals remanded the case with instructions to vacate and dismiss for mootness. In this case, the Court of Appeals affirmed the District Court's decision. This Court in Super Tire held that since declaratory relief was sought there was an issue under the Declaratory Judgments Act. From the foregoing, it can be readily seen that this case and Super Tire have many similarities. However, it is necessary to examine the reasons underlying the decision.

In both cases, the strikes had been resolved prior to the Court hearings. The Respondents in Super Tire relied solely upon this ground for contending the case was moot. Here, the basis for contending the case is moot is the fact that the Appeals Tribunal and, later, the

Board of Review ruled in favor of Westinghouse. Therefore, the challenged statute was not relied upon to award benefits.

In Super Tire, the Majority Opinion based its decision on the fact that the challenged governmental activity was not contingent on the discretionary act of an official. At Pages 8 and 9 of the L. Ed Opinion, the Court states:

> "The New Jersey governmental action does not rest on the distant contingencies of another strike and the discretionary act of an official. Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, and in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers." (Emphasis Supplied)

In the case before the Court, the challenged governmental action did, as a matter of fact, rest on the discretionary act of governmental officials, the members of the Appeals Tribunal, and these governmental officials did, in fact, rule on January 9, 1980 that the striking employees were not entitled to benefits. Furthermore, the striking employees do not know that when they go out on strike, public funds are available. In West Virginia, the unemployment benefits are only available if the striking employees demonstrate that they have been denied the right of collective bargaining under generally prevailing

conditions. Therefore, the governmental action involved herein is clearly distinquishable from the governmental action in Super Tire, supra.

The remarks of Justice Stewart in the dissenting opinion with whom three Justices joined, merit consideration here. Justice Stewart relied upon Article III of the Constitution which prohibits this Court from issuing advisory opinions. As it has been previously advocated, since Westinghouse has sustained no monetary loss to date in this matter, any opinion at this time would be merely advisory. Furthermore, the underlying work stoppage and the challenged governmental action have long ceased before the Petition was filed in this Court and any opinion would have no effect on any actual matters in controversy. The basis of Judge Haden's ruling was that the present controversy was 'capable of repetition, yet evading review'. Here, there is nothing to prevent the challenged statute from being reviewed by the Circuit Court of Kanawha County or the Supreme Court of Appeals of West Virginia.

In summary, it is contended that the issue before the Court is moot at the present time and unless the Circuit Court of Kanawha County reverses the decision of the Board of Review, there is no case or controversy existing between the parties. Further, it is argued that the decision in Super Tire Engineering Company, supra, is not controlling, because the gravamen of that decision was that the challenged governmental activity, that is, the payment to striking

workers benefits under the State Welfare program was fixed and definite and not contingent upon executive discretion. Whereas, here the challenged governmental activity, the payment to striking employees of benefits, is not fixed and definite but was obviously contingent upon executive discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack O. Friedman, do hereby certify that I have this 3rd day of June, 1981, mailed a true copy of the foregoing Memorandum in an envelope, properly stamped and addressed to Peter D. Post, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219.

Jack O. Friedman

No. 80-955

APR 13 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security;
J. F. McCLANAHAN, CLARENCE ELMORE,
and JOHN T. POFFENBARGER,
Members of the Board of Review,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' Brief in Opposition is based upon two fundamental misconceptions concerning the principles of federal labor law preemption set forth in prior decisions of this Court:

1) That the plurality decision in *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979) provides a blanket exception from federal preemption for all state unemployment compensation laws, regardless of the extent to which a particular state statute regulates the collective bargaining process between an employer and its employees.

2) That because the purported purpose of the West Virginia unemployment compensation law is to pay unemployment compensation benefits, that law does not "regulate" collective bargaining and is therefore not subject to federal preemption.

These misconceptions serve to underscore the need for this Court to grant plenary review in this case, and to clarify the principles enunciated in *New York Telephone* with respect to these important issues of federal labor law preemption.

I. This Court's Decision In New York Telephone Did Not Create An Exemption From Labor Law Preemption For State Unemployment Laws Such As West Virginia's, Because That Decision Was Limited To A State System Which Did Not Regulate The Bargaining Relationship Between An Employer And Its Employees.

In *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979), this Court, in a plurality opinion authored by Justice Stevens, ruled

that New York's unemployment compensation law (under which striking employees, after an eight-week waiting period) receive benefits from a fund financed by employer contributions, was not preempted by federal labor law. Resondents read *New York Telephone* as providing a blanket exemption from federal preemption for all state unemployment compensation statutes, regardless of the extent to which those laws regulate the collective bargaining process between an employer and its employees. Brief in Opposition at 13-14.

As Respondents admit, however, the "primary concern" of the Court in *New York Telephone* "was the effect of unemployment compensation benefits on the outcome of a labor dispute." Brief in Opposition at 12. *New York Telephone* did not address the present situation, wherein the West Virginia statute subjects the bargaining conduct of an employer to scrutiny and review by a state administrative tribunal as a necessary corollary to that tribunal's determination of the eligibility of striking employees for unemployment compensation benefits. Unlike the West Virginia statute, New York's unemployment compensation law provided for payment of benefits to all striking employees after an eight-week waiting period, and did not involve any state infringement upon matters which lie in the exclusive jurisdiction of the National Labor Relations Board, such as the regulation of bargaining conduct.

On the other hand, the West Virginia statute generally denies benefits to striking employees. But that statute awards benefits to strikers if the West Virginia state authorities determine that the employer has committed an unfair practice in its bargaining with employees. W. Va. Code §21A-6-3(4). Petition at 11 n.5 and 19. Respondents admit that this provision requires the

West Virginia Board of Review to examine the same issues as would be reviewed by the NLRB in an unfair labor practice proceeding. In fact, Respondents go so far as to state that if "the National Labor Relations Board makes a different determination under the same set of facts, they would not affect the validity of the State decision." Brief in Opposition at 15.

This is certainly a situation where a state statute interferes with the NLRB's development of uniform principles governing the collective bargaining process. Although the NLRB might have held a particular bargaining practice to be perfectly legal in numerous decisions, an employer with employees in the state of West Virginia would still be loathe to engage in that practice if it were contrary to the rules developed by the West Virginia unemployment compensation officials. Subjecting the bargaining conduct of an employer to the scrutiny of an administrative agency other than the NLRB "invites precisely the harms that the preemption doctrine is designed to avoid." *New York Telephone, supra,* 440 U.S. at 529 n. 15. *See also Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).[1]

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1. Respondents' attempt to distinguish this Court's decision in *Garmon* (Brief in Opposition at 8) is unpersuasive. The instant case involves state regulation of employer conduct—through state scrutiny of bargaining practices—much as *Garmon* involved state regulation of conduct within the exclusive jurisdiction of the NLRB. In fact, a NLRB charge was filed against Westinghouse by the IUE challenging the very same conduct which was at issue in the West Virginia unemployment compensation proceedings. See Petition at 7.

The difference between the *New York Telephone* situation and the present case is quite dramatic. It is essentially the difference between a general tax and a specific fine. While the New York statute acts like a general tax and does not regulate the practices engaged in by employers in bargaining, the West Virginia statute is in the nature of a specific fine which will regulate an employer's conduct by imposing liability upon it if it engages in what the state finds to be improper conduct in the collective bargaining.[2] If Respondents are correct in asserting that a blanket exemption from preemption exists for state unemployment compensation laws, then a state could regulate virtually any aspect of the employer-employee relationship. For example, a state could have a law denying benefits to workers who were discharged, except in cases in which the discharge was for conduct which the state finds was protected by §7 of the NLRA. Similarly, a state could provide benefits to all employees engaged in an economic strike, except those employees who picket the employer's plant. Contrary to Respondents' assertion, however, these types of statutes clearly would be preempted under the numerous prior decisions of this Court.

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2. Respondents admit that unemployment compensation awards rendered today will affect Westinghouse's merit rate account and monetary payments in the future, even though all West Virginia employers currently are paying the same rate because of insolvency of the trust fund. (Brief in Opposition at 9). Thus, an award of unemployment compensation against Respondent would cost 1.5 million dollars although that payment would not occur all in the present year. Petition at 5 n. 2. Moreover, the unconstitutionality of the West Virginia statute is not removed because, at the present time, the monetary impact of a 1.5 million dollar award will be delayed slightly.

The position asserted by Respondents, and the position adopted by the District Court and Fourth Circuit in this case—that a blanket exception to labor law preemption exists for all state unemployment compensation laws—is based upon a misconception of the rationale of the plurality decision in *New York Telephone,* and contravenes the principles underlying the labor law preemption doctrine as enunciated in numerous decisions of this Court.

II. Because The West Virginia Statute Involves Scrutiny And Regulation Of The Propriety Of The Employer's Collective Bargaining Practices, Even If The Statute's Purported Purpose Were To Pay Benefits, That Alleged Purpose Would Not Eliminate The Preemption Issue.

The second fundamental misconception inherent to the arguments set forth in Respondents' Brief in Opposition is that because the alleged purpose of the West Virginia unemployment statute is to pay benefits, that statute is automatically exempted from federal preemption. Under Respondents' view, states apparently would be free to regulate the relations between an employer and his employees to any extent desired, so long as such regulation occurs in conjunction with application of an unemployment compensation statute. This view is not supported by the decisions of this Court in which the labor law preemption doctrine has been applied to state laws in spite of the general applicability of those laws. See, e.g., *Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1972) (state general contract law preempted); *Garmon, supra* (State tort law); *Amalgamated Association of Street, Electric Railway & Motor*

Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951) (state law protecting the public from interruption of Public Utility service); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468 (1955) (state restraint of trade statute). Importantly, in *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), this Court held that a *state unemployment compensation law* was preempted by the Act.

Thus, there is no merit to Respondents' argument that the West Virginia statute is exempt from preemption because its purpose is to provide for unemployment compensation benefits. The purported purpose of a state statute is not dispositive for preemption purposes. Indeed, *"[r]egardless of the mode adopted,* to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon, supra,* 359 U.S. at 244. (Emphasis supplied).

As shown by the above decisions, this Court has on numerous occasions looked at the effect, rather than the stated purpose, of state statutes in applying the preemption doctrine because many types of state statutes, in addition to specific state labor laws, can regulate activity covered by the NLRA and thereby create the risk of inconsistent regulation. Certainly, the statute in the instant case regulates collective bargaining even though its purported purpose concerns unemployment compensation benefits. Under the applicable provision of W.Va. Code §21A-6-3(4), state officials or state judges must determine whether an employer has denied employees "the right of collective bargaining under generally prevailing conditions." Under this provision,

West Virginia state officials make determinations concerning the propriety of Westinghouse's 1979 national collective bargaining with the IUE and other unions. *See* Petition at 7-8. Thus, in this case, even if the alleged purpose of West Virginia's statute related to unemployment compensation, its effect nonetheless is to regulate activity which is the central concern of the NLRA.

Respondents repeatedly attempt to minimize the effect of the lower court's decision by noting that West Virginia's Board of Review eventually denied benefits to the employees participating in the strike at Westinghouse's Fairmont, West Virginia plant. Respondents' reliance on that decision,[4] underscores the fact that Respondents have totally missed the point of Petitioner's preemption argument. The point which Respondents ignore is that nothing in *New York Telephone,* or in the legislative history of the Social Security Act upon which this Court relied in *New York Telephone,* authorizes states to involve themselves in the employer's bargaining practices by determining matters which lie in the exclusive jurisdiction of the NLRB, such as the propriety of the conduct of an employer during collective bargaining.

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4. The Board of Review decision was recently affirmed by the West Virginia Circuit Court. The decision of the West Virginia Circuit Court may be appealed to the West Virginia Supreme Court of Appeals by filing a petition within sixty days of the decision. The fact that the denial of benefits was affirmed by the West Virginia Circuit Court does not render the preemption arguments of Westinghouse moot, because the interference of West Virginia's unemployment compensation law with the collective bargaining process is an issue which is "capable of repetition, yet evading review." *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 125 (1974); *Roe*

Respondents concede that if the lower court's decision is permitted to stand, national employers such as Westinghouse will be subject to inconsistent and divergent regulation of collective bargaining from state to state.[5] Respondents assert, however, that such divergent regulation is present in all situations where states are permitted to enact their own programs. *Id.* Respondents' assertion underscores the importance of the instant case, and the need for this Court to grant plenary review.

The cornerstone of the labor preemption doctrine is the presumption that when Congress enacted the NLRA, it intended that the NLRB would develop uniform standards to be applied in assessing the propriety of conduct of employers, employees, and labor organizations subject

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v. Wade, 410 U.S. 113, 125 (1973). Without review of the constitutionality of West Virginia's statute at this time, the propriety of Westinghouse's conduct during future collective bargaining negotiations will continue to be subject to the regulation and scrutiny by state agencies, in clear contravention of the principles underlying the preemption doctrine.

5. Brief in Opposition at 17. The deleterious effect which such a principle would have upon national collective bargaining is apparent. Negotiators would have to gauge their conduct during bargaining not only to the standards developed by the NLRB, but would also be required to ensure that their conduct, even if legal under the NLRA, did not violate some state unemployment compensation board's notion of "good faith" bargaining. Each state could have different standards, and employers such as Westinghouse, with employees in many different states, would have to constantly assess their bargaining position to avoid the potential of multi-million dollar claims against the company. Indeed, under Respondents' view, it may be necessary for an employer, in order to comply with the bargaining standards of one state, to engage in conduct which would violate the standards in another state or the standards developed by the NLRB.

to the NLRA's provisions. If each state has the unrestricted power to develop its own standards of conduct for collective bargaining by making unemployment compensation benefit awards hinge upon a determination of whether employees have been "denied the right of collective bargaining under generally prevailing conditions," then the preemption doctrine, which this Court has developed over a period of almost fifty years, will be severely undermined.

We respectfully submit that the Court should accept this case to clarify this issue. The Fourth Circuit has incorrectly held that the doctrine of federal labor preemption is totally inapplicable to whatever regulation of collective bargaining conduct that a state effects through use of its unemployment compensation laws.[6]

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6. The list of subsidiaries of Westinghouse required by Rule 28.1 was affixed to the Petition filed on December 12, 1980.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Westinghouse respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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